

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Implementation of Sections of the
Cable Television Consumer Protection
and Competition Act of 1992

Rate Regulation

MM Docket No. 92-266

PETITION FOR RECONSIDERATION
BY AFFILIATED REGIONAL COMMUNICATIONS, LTD.

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SUMMARY

The regional sports programming services distributed by Affiliated Regional Communications, Ltd. ("ARC") promote the objectives of localism and diversity by providing live coverage of local sports events and expanding the variety of programming choices available to viewers. However, the rate regulations adopted by the Commission in this proceeding will impair ARC's ability to develop and to distribute those services.

Because the Commission's benchmark rates do not take into account the cost, quality or value to subscribers of programming carried on a particular channel within a regulated service tier, the benchmarks encourage cable operators to cease carrying higher-cost programming or to shift it from regulated tiers to a la carte offerings. Cable operators faced with benchmark rate regulation have no incentive to absorb the cost of carrying such programming on the basic tier or other regulated service tiers. "Tier-neutral" benchmarks also eliminate programmers' flexibility to negotiate higher rates for carriage on non-basic service tiers to compensate for the reduced viewership on those tiers, further encouraging cable operators to shift higher-cost programming services to a la carte offerings. The adverse effects of such carriage are well known to ARC because many of its regional sports services began as a la carte offerings and struggled to survive before being repackaged as basic or "expanded basic" programming services.

The Commission's decision to prohibit cable operators from passing through to subscribers affiliated programmers' cost

increases exceeding the rate of inflation will further impair ARC's ability to improve or even to maintain its program offerings because affiliated cable operators facing rate regulation will be unwilling to absorb such cost increases. Limiting the pass-through of affiliated programming cost increases to the inflation rate when the Commission has recognized that such increases have "far exceeded" that rate arbitrarily penalizes affiliated programmers. The pass-through prohibition also provides another incentive for many cable operators to shift ARC's regional sports services to a la carte offerings, thereby decreasing their distribution and increasing their cost to subscribers, or to drop those services. The broad prohibition adopted by the Commission is unnecessary -- a narrow remedy can be tailored to address any perceived problem or abuse.

While rate regulation discourages broad distribution of ARC's regional sports services and inhibits its ability to recover increasing programming costs, other regulations mandate broad distribution of, and provide for retransmission consent payments to, local broadcast stations. Likewise, the Commission's rate regulations allow the full pass-through of cost increases attributable to other cable sports services unaffiliated with cable operators which also compete with ARC's services for viewers and programming. Thus, contrary to the express intent of Congress, the Commission's rate regulations will place significant and unnecessary constraints on the programming marketplace, constraints which are particularly harmful to higher-quality and higher-cost "affiliated" programming services, including ARC's services.

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**PETITION FOR RECONSIDERATION
BY AFFILIATED REGIONAL COMMUNICATIONS, LTD.**

Affiliated Regional Communications, Ltd. ("ARC") hereby petitions, pursuant to Section 1.429 of the Commission's Rules, for reconsideration of the Commission's First Report and Order, FCC 93-177, released May 3, 1993 ("Report & Order"). The Commission's benchmark system of rate regulation, combined with regulations adopted in other proceedings to implement the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), will seriously impair ARC's ability to develop and to distribute its regional sports programming services.

ARC's Interest In This Proceeding

ARC distributes regional and national sports programming to cable operators and other multichannel video programming distributors. ARC has ownership interests in six regional sports programming services which produce programming featuring a variety of sporting events, including professional

and collegiate contests in their respective regions. Together

300/- regional agents services or to shift them from basis or

motion of a "diversity of views and information" available to the public is one of the Congressional policies underlying the 1992 Cable Act. See 1992 Cable Act, §2(b)(1). The Act also is intended to further the "substantial governmental interest" in the local origination of programming. Id. at §2(a)(10). The Commission expressly has acknowledged that the development of regional sports programming services has contributed substantially to the overall increase in the diversity of programming services available to consumers. See, e.g., Competition, Rate Deregulation And the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd. 4962, 4966 n.8 (1990) (number of cable programming services doubled between 1984 and 1990, with regional sports services being a "primary growth area").

Likewise, the Commission and the courts have determined that the public interest is served by live coverage of "outstanding local events [such] as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest." United States v. Midwest Video Corp., 406 U.S. at 668-69, quoting National Broadcasting Co. v. United States, 319 U.S. 190, 203 (1943) (emphasis added). Regional sports programming services clearly promote the public interest by providing substantial quantities of locally produced programming featuring live coverage of sports events involving local teams. Particularly at the college and high

A. The Commission's Benchmarks Do Not Account
For The Higher Cost Of Providing Regional
Sports Services.

ARC's regional sports networks feature live coverage of local professional and collegiate sporting events. Regional networks incur substantial costs to acquire the rights for those events and to provide the equipment and crews necessary to televise them. The annual rights fees for such regional professional sports packages may cost millions of dollars. Further, unlike other types of programming, "sports events have substantial entertainment value only at the time of their occurrence." Regulations Pertaining to the Showing of Sports Events on Over-the-Air Subscription Television or by Cablecasting, 52 F.C.C.2d 1, 57 (1974), on recon., 54 F.C.C.2d 797 (1975), set aside on other grounds sub nom. Home Box Office, Inc. v. F.C.C., 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). The high cost of regional sports programming cannot be spread over multiple showings of the same programming over extended periods of time. Consequently, regional sports programming services often are more expensive than other programming services available to cable operators. For example, the rights fees and costs of one of ARC's regional sports networks offering programming from several professional sports teams necessitate charges to cable operators within the network's inner market of \$1.00 per subscriber.

In order to maximize viewership and advertising

regional sports networks routinely seek carriage as part of basic or "expanded basic" service and offer substantial incentives for cable operators to provide such carriage. As a result, the vast majority of cable systems currently carrying ARC networks do so as part of the basic or "expanded basic" tier.

Unfortunately, the Commission's regulations governing rates for basic and other cable programming service tiers establish a uniform benchmark rate applicable to all channels on regulated tiers, regardless of the cost, quality or value to subscribers of the programming. Under the Commission's rate regulations, cable operators would have little incentive to carry higher-cost services like ARC's regional sports services on popular tiers, which will be subject to benchmark rate regulation. For example, the base rate to an inner market cable operator in the regional sports programming service example provided supra at 6 is nearly twice the benchmark rate applicable to a 40-channel system with 20 satellite channels, regardless of the number of subscribers to that system. Therefore, faced with uniform benchmark rate regulations, cable operators are likely to cease carrying ARC's services or to seek to shift them from regulated tiers to a-la-carte offerings -- attempts which ARC already is encountering in the marketplace.

A wholesale shift of ARC's regional services from the basic or expanded basic tiers upon which they are now carried to a-la-carte offerings would seriously damage ARC's

business. Many of its regional sports services started as a-la-carte or premium services. Subscribership and advertising revenues were limited, and the struggling services had fewer programming options. Only after regional sports services were re-marketed as basic or expanded basic services did they begin to flourish. Having established those services as part of the basic or expanded basic package on most cable systems, ARC is now threatened with a potential return to a-la-carte carriage or loss of carriage, resulting solely from the disincentives created by the Commission's rate regulations.

B. The Commission's "Tier-Neutral" Benchmarks Inhibit Pricing Flexibility For Programmers, Further Encouraging A-La-Carte Carriage Of Regional Sports Services.

Aside from failing to account for differences in the cost, quality and value of programming carried on particular channels on regulated tiers, the Commission's "tier-neutral" benchmarks ignore important effects on programmers of carriage on basic or other tiers. As ARC reported in its comments filed January 25, 1993 in Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265, at 13:

Programming prices usually are based on a monthly per-subscriber fee, and the number of subscribers will vary dramatically depending on whether the service is offered as part of the basic tier, an expanded basic tier or a higher-priced programming tier, or as an a-la-carte pay service.

Because the number of subscribers to a particular service usually "decreases with non-basic" carriage, programmers

typically charge more if a cable operator seeks to carry a programming service on a tier other than basic or expanded basic in order to compensate for the decrease in subscriber-ship and the corresponding loss of advertising revenues. Id. at 13-14.

Although ARC's regional sports services frequently have been carried on the "expanded basic" tier, the Commission has determined that, pursuant to the 1992 Cable Act, there can be "only one basic tier" and that an "expanded basic" tier "would thwart Congress' intent." Report & Order at ¶¶169-170. Because only the basic tier will be received by all subscribers, carriage of a particular programming service on other cable programming tiers will decrease subscribership for that service. While recognizing that there is a significant difference between carriage on the basic tier and carriage on other cable programming tiers -- at least as far as broadcasters are concerned² -- the Commission's "tier-neutral" benchmark rates disregard that difference for cable programming services.

By adopting uniform, "tier-neutral" benchmarks, the Commission substantially restricts a programmer's flexibility to negotiate a higher rate where a cable operator chooses to carry a particular programming service on a tier other than the universally available basic service tier because cable

² The 1992 Cable Act and the Commission's Rules require that all broadcast television stations (other than super-stations) carried by a cable system be carried on the basic service tier. 47 U.S.C. §543(b)(7); Report & Order at ¶157.

operators have no financial incentive to distinguish between basic and non-basic cable services. Thus, the Commission's "tier-neutral" benchmark rates encourage cable operators to seek to drop or to shift high-quality and high-cost programming from popular tiers to a-la-carte offerings.

gramming costs" which exceed the rate of inflation. Report & Order at ¶251. However, the Commission also created "one important exception to the pass-through of programming costs," prohibiting cable operators from passing through "increases in programming costs attributable to the program services affiliated with" the cable operator to the extent that such increases exceed the inflation rate. Id. at ¶252. "Affiliated" programming services are determined, for purposes of the cost pass-through prohibition, under the attribution standard adopted in the program access proceeding. Id. at ¶252 n.601.

This exception to the programming cost "pass-through" plainly penalizes cable operators and/or affiliated programmers arbitrarily. The Commission expressly has recognized that:

The record shows that programming costs have increased at a rate far exceeding the rate of inflation. While operators could justify increased rates under a cost-of-service showing, we are concerned that regulation of basic service tier rates, at least during the early stages of rate regulation, might inadvertently harm the continued ability of programmers to develop and produce programming. Capping rate increases at GNP-PI also would ignore the faster rate of increase in programming costs.

Id. at ¶251 (emphasis added and notes omitted). Thus, cable operators are faced with the prospect of cost-of-service regulation which the Commission has recognized as undesirable and burdensome; additional lost revenues resulting from unrecovered increases in programming costs; or, more likely, resistance to programming cost increases regardless of the effect on programming quality.

As a result, the very same "innovative programming services that would not have been feasible without the financial support of cable system operators" now will be unable to recover cost increases "far exceeding" the rate of inflation which are necessary to improve their existing programming and to develop new programming -- solely because of cable's investment in those services. See Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 628, 102d Cong., 2d Sess. 41 (1992). ARC's regional sports networks will be particularly penalized by the pass-through prohibition. Liberty Media Corporation owns a controlling interest in ARC and holds ownership interests in various entities which own and operate cable systems. In addition, several of the regional services in which ARC has an interest or which are affiliated with Prime Network are partnerships or corporations in which cable operators hold cognizable ownership interests under the Commission's attribution standard. Clearly, the cable operators most likely to invest in a regional sports network are those with systems in the region served by that network.

The Commission's cost pass-through exception will seriously and adversely affect ARC's ability to recover increases in the cost of providing and improving its regional sports networks. Many of the cable systems in the respective regions served by the regional sports networks will be prohibited from passing through to subscribers the full amount of those cost increases, and cable operators faced with benchmark

rate regulation are unlikely to absorb the difference between ARC's rates and the applicable benchmark as well as future cost increases exceeding the rate of inflation. Thus, the Commission's pass-through prohibition simply provides further incentives for many cable operators to cease carriage of ARC's ~~residential service networks or to attempt to shift them from~~

inhibits the ability of those services to recover their investments in new and better programming, other statutory provisions and Commission regulations promote the distribution of broadcast and other cable programming.

For example, local broadcast television stations also televise local professional and collegiate sports events. The must-carry provisions of the 1992 Cable Act and related Commission rules guarantee carriage of such broadcast competitors on the basic service tier which all subscribers are required to purchase. The 1992 Cable Act and Commission regulations also encourage retransmission consent payments by cable operators to broadcasters, providing additional revenues which broadcasters may use to purchase the rights to sports events, thereby increasing the rights fees paid by ARC's regional sports networks.

ARC's regional networks also compete for viewers and television rights with other cable programming services, including unaffiliated national and regional cable sports networks such as ESPN. The Commission's rate regulations will allow all cable operators to pass through to subscribers the full amount of any programming cost increases incurred by these services. However, as set forth supra at 10-13, cable operators affiliated with ARC's regional sports networks may pass through programming cost increases only up to the rate of inflation, which the Commission has recognized to be grossly inadequate. Consequently, ARC's regional networks would be at

a substantial disadvantage in competing with unaffiliated sports services for the rights to televise sports events.

Moreover, cable operators faced with benchmark rate regulation and unable to pass cost increases through to subscribers are not likely to absorb increases in the cost of ARC's programming in order to continue to offer that programming on regulated tiers. Instead, they are likely to attempt to shift the regional sports services to a-la-carte offerings, thereby decreasing their subscribership and advertising revenues, further undermining ARC's competitive position. Finally, in some cases channel occupancy limits proposed by the Commission in Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions, MM Docket No. 92-264, FCC 92-542 (rel. Dec. 28, 1992), may prevent affiliated cable operators from carrying

ARC's regional sports networks alternative

available to consumers. First, as set forth above, the pass-through prohibition substantially penalizes the very programmers that have contributed to the current "wealth of new viewing options" for consumers by severely restricting their ability to recover their costs of improving existing services and developing new ones. Second, the Commission's benchmarks are structured so that cable operators do not have any financial incentive to add high-quality programming services.

The Commission's benchmark rates arguably may be interpreted such that the addition of new programming services reduces the benchmark rate applicable to all channels carried by the cable operator on regulated tiers. Because the cost to the cable operator of existing programming services is normally fixed by multi-year contracts, the addition of a new service would lower the cable operator's margin on all existing services. Unless the new service attracts a sufficient number of new subscribers to the system or provides a margin to the cable operator sufficient to cover the decrease in its margin on all other channels plus the transaction costs incurred in adding the new service, a cable operator would have little financial incentive to distribute new or additional programming services. To promote the distribution of new and diverse programming, the Commission should clarify its benchmark rules to permit regulated cable operators to increase their rates by an amount sufficient to cover the

costs of the newly-added programming services and a reasonable profit.

Conclusion

Contrary to the intent of Congress, the Commission's current benchmark rate regulations will unnecessarily and adversely affect programming services, particularly those numerous services which the Commission has deemed to be "affiliated" with cable operators. The Commission can revise its rate regulations and avoid such substantial injury to the quality and quantity of programming services, which already are subject to competitive constraints, without diminishing the effectiveness of or creating loopholes to those regulations.³

June 21, 1993

Respectfully submitted,

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³ ARC notes that the constitutionality of the underlying statute is the subject of ongoing litigation. ARC reserves its right to challenge the constitutionality of the statute, the Commission's implementing rules, and their specific application to ARC and its programming services.

**REGIONAL SPORTS PROGRAMMING SERVICES
IN WHICH ARC HAS AN OWNERSHIP INTEREST**

<u>Network</u>	<u>Region*</u>
Home Sports Entertainment	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas
Home Team Sports**	Maryland, North Carolina, Virginia, and Washington, D.C.
Prime Sports Network -- Rocky Mountain	Colorado, Kansas, Nebraska, New Mexico, South Dakota, and Wyoming
Prime Sports Network -- Midwest	Illinois, Indiana, Missouri, Ohio, and Wisconsin
Prime Sports Network -- Upper Midwest	Iowa, Minnesota, North Dakota, South Dakota, and Wisconsin
Sunshine Network	Florida

* The regions include all or a portion of the designated states. Consequently, different portions of the same state may be included in multiple regions.

** ARC owns a 33.3 percent limited partnership interest in Home Team Sports. ARC also recently acquired a 33.3 percent general partnership interest in Prism/Philadelphia SportsChannel.

**REGIONAL SPORTS PROGRAMMING SERVICES
AFFILIATED WITH PRIME NETWORK**

In addition to the six regional services in which ARC has an ownership interest, the following regional sports programming services are affiliated with the Prime Network:

<u>Network</u>	<u>Region*</u>
Empire Sports Network	New York
KBL Sports Network	Maryland, Ohio, Pennsylvania, and West Virginia
Madison Square Garden	Connecticut, New Jersey, and New York
New England Sports Network	Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont
Prime Sports Network -- Intermountain West	Idaho, Montana, Nevada, Utah, and Wyoming
Prime Sports Northwest	Alaska, Idaho, Montana, Oregon, and Washington
Prime Ticket	Arizona, California, Hawaii, and Nevada
Pro Am Sports System	Michigan
SportSouth Network	Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee

* The regions include all or a portion of the designated states. Consequently, different portions of the same state may be included in multiple regions.